No. 04-631

Supreme Court, U.S.
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In The Supreme Court of the United States

JOAN WAGNON, In her official capacity as Secretary Kansas Department of Re enue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL INTERTRIBAL TAX ALLIANCE, BAY MILLS INDIAN COMMUNITY, BIG PINE PAIUTE TRIBE, CHEYENNE RIVER SIOUX TRIBE, CONFEDERATED TRIBES OF SILETZ INDIANS OF OREGON, HANNAHVILLE INDIAN COMMUNITY, LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, LOWER BRULE SIOUX TRIBE, MASHANTUCKET PEQUOT TRIBAL NATION, NAVAJO NATION, NORTHERN ARAPAHO TRIBE, OSAGE NATION, PASCUA YAQUI TRIBE, POKAGON BAND OF POTAWATOMI INDIANS, ROSEBUD SIOUX TRIBE, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS AND WALKER RIVER PAIUTE TRIBE IN SUPPORT OF RESPONDENT

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BRIEF FOR *AMICI CURIAE* NATIONAL INTERTRIBAL TAX ALLIANCE AND INDIVIDUAL INDIAN TRIBES IN SUPPORT OF RESPONDENT

Many tribes and states are discovering ways to set aside jurisdictional debate in favor of cooperative government-to-government relationships that respect the autonomy of both governments. Tribal governments, state governments and local governments are finding innovative ways to work together to carry out their governmental functions. New intergovernmental institutions have been developed in many states, and state-tribal cooperative agreements on a broad range of issues are becoming commonplace.

National Conference of State Legislatures, National Congress of American Indians, Government to Government: Understanding State and Tribal Governments 2 (2000)

INTEREST OF *AMICI CURIAE*[1]

The National Intertribal Tax Alliance (NITA) was formed in 2001 for the purpose of enhancing and strengthening tribal governments through education on issues related to tribal taxation and economic development. NITA is a non-profit organization dedicated to promoting the development and implementation of tribal laws, procedures and administration relating to tribal taxation and to assisting Indian tribes in exercising their inherent power to levy, impose, collect and utilize tribal tax revenues.

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[1] No one other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

The individual *amici* Tribes represent a cross-section of Tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations and histories. All *amici* share a sense of outrage at the primary argument in Petitioner's brief that this Court should abandon the doctrine of *stare decisis* and should set aside the applicable balancing of interests test as unworkable. *Amici* have a strong interest in protecting tribal sovereignty, in securing tribal self-sufficiency and in ensuring that the numerous intergovernmental tax agreements between states and Indian tribes are not undermined by the present litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Kansas seeks to impose its motor fuel tax on gasoline sold by the Praire Band Potawatomi Nation ("Tribe") at a tribally-owned gas station located on the Reservation (the "Station"). The Tribe already imposes a tribal tax on the retail sale of motor fuel on the Reservation that is approximately the same rate as the state tax and the price of fuel at the Nation Station (including the tribal tax) is set at fair market price. Boursaw Aff. ¶ 2.A (J.A. 69-70). It is undisputed that it would be impossible for both the state and tribal taxes to be imposed. The expert testimony accepted by the lower courts concluded that "the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [Station] fuel business to virtually zero." Pflaum Rep. § 3.2 (J.A. 44).

Prior to 1995, the State of Kansas did not collect the state tax on motor fuel distributed to Indian lands based on the fact that Kansas law expressly placed the legal incidence on fuel retailers (such as the Station). During

this time, the State worked cooperatively with the Kansas Tribes, recognizing "the duty of each to negotiate with the other on a government-to-government basis pursuant to [the] national Indian policy of economic, social and political self-determination for Indian tribes." *See* Tax Compact Between the Prairie Band Potawatomi Indians and the State of Kansas (set forth in J.A. 20-26). But in 1995, Kansas amended its Motor Fuel Tax Act, Kan. Stat. Ann. §§ 79-3401 *et seq.* (1997), in order to shift the legal incidence of the tax to fuel distributors. *See* Kan. Stat. Ann. § 79-3408(b). After which the State abruptly terminated the Tax Compacts with the Kansas Tribes and litigation shortly ensued.

Applying the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Tenth Circuit properly concluded that under the particular facts of this case, the state tax "interferes with and is incompatible with strong tribal and federal interest against taxation." J.A. 144. The Tenth Circuit correctly found that the state tax, although nominally involving a fuel distributor off-reservation, infringed upon the on-reservation activities of the Tribe. J.A. 139. Under *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980), state taxes may not be imposed where revenues burdened by the tax are derived from "value generated on the reservation by activities involving the Tribe."

In this litigation, the State of Kansas has taken an unreasonable and untenable position, asking this Court to abandon the doctrine of *stare decisis* and to set aside the balancing of interests test set forth in *Bracker*. However, the balancing test allows the courts to appropriately assess the sovereign interests of the state against the sovereign

interests of the tribe and the federal government.[2] This balancing of the interests test has provided a longstanding, workable framework under which hundreds of intergovernmental cooperative agreements have been negotiated between states and Indian tribes for the past 25 years. Petitioner wrongly suggests to the Court that the balancing of the interests test has proven "unworkable" and that it must be replaced with a bright-line test – an express preemption requirement and a formalistic legal incidence test – under which Petitioner gets everything and Indian Tribes get nothing.

The only reason the balancing test is "unworkable" is due to Petitioner's unwillingness to negotiate cooperative tax agreements with the Kansas Tribes and its present reliance on litigation to resolve disputes. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 518 (1991), the Court endorsed the balancing of interests test and recognized that states have alternative mechanisms available to them in lieu of

[2] The federal interest is evident in the regulatory framework established by the Federal-aid Highway Program which is designed to harness the complementary contributions of the various governmental entities, including tribal governments, involved in the planning, designing, financing, constructing, monitoring and maintaining the nation's road systems. *See, e.g.,* 23 C.F.R. § 450.210(a). In addition, the Federal Highway Administration ("FHWA") works with tribal and state transportation departments to establish inter-governmental transportation agreements to "combine their efforts with available resources in a coherent inter-governmental partnership that result in more efficient, improved and beneficial transportation services to Indian and non-Indian neighbors residing, working or traveling in each of the party's governmental jurisdictions." *See* Government to Government Accord By and Among the Federal Highway Administration (Minnesota Division), the Minnesota DOT and eleven tribes in Minnesota, § III (2002), *available at* http://www.dot.state.mn.us/mntribes/accord02.doc.

litigation, including the ability to "enter into agreements with tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."

As this brief explains, over the years, partly in reliance on the guidance provided by this Court, Indian tribes have worked cooperatively with their respective state governments to develop mutually respectful relationships and to avoid disputes by resolving their differences over taxation authority through the use of state-tribal tax compacts. In fact, many state governments recognize that tribal governments have a legitimate interest in collecting taxes, in particular, motor fuel taxes to pay for the construction and maintenance of reservation roads, bridges and other transportation infrastructure.[3] The story of the Navajo Nation, and its cooperative tax agreements with five states (Arizona, New Mexico, Utah, California and Texas), is particularly instructive. In addition, this brief provides an overview of the longstanding, oftentimes difficult, relationships between three other States – South Dakota, Oklahoma and Michigan – and the Indian tribes located within their borders who have worked hard to establish a "mutually satisfactory regime" for the collection and distribution of motor fuel taxes.[4]

[3] For example, the State of New Mexico has adopted legislation which provides a deduction for gallons sold on Indian reservations in computing the New Mexico gasoline tax due where an Indian tribe assesses a tribal gas tax. N.M. Stat. Ann. § 7-13-4 (1999).

[4] Inexplicably, contrary to the course of action taken by their respective state legislatures in authorizing and approving state-tribal tax compacts, the attorney general of South Dakota, in coordination with the attorney generals of New Mexico, Oklahoma, Michigan and Utah has prepared and filed an *amicus* brief in support of the State of Kansas.

Many states and Indian tribes have made great strides towards improving intergovernmental relations despite their history of conflict and animosity. State-tribal tax compacts are but one example of the types of intergovernmental cooperative agreements in place throughout Indian country. State and tribal governments have dedicated substantial time and resources to find practical, on-the-ground solutions to complex legal questions involving their overlapping jurisdictional authority in several subject matter areas. The result sought by Petitioner has the potential to undermine all of these cooperative agreements, leading to more, not less, litigation.

ARGUMENT

I. Many States and Indian Tribes Have Entered Into Intergovernmental Cooperative Tax Agreements That Recognize and Affirm Their Respective Sovereign Interests.

A core attribute of tribal sovereignty is the Tribes' power to tax – the ability to raise revenues essential to fulfilling their role as sovereign governments. *Colville,* 447 U.S. at 152 ("power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty"). In Indian country, tribal governments are principally responsible for the construction and maintenance of reservation roads, bridges and other transportation infrastructure. In order to fulfill these responsibilities and accommodate the competing interests of two sovereigns, Indian tribes have worked cooperatively with their respective state governments on a sovereign-to-sovereign basis.

Intergovernmental cooperative agreements have been deemed a "device of necessity" which acknowledge and

preserve the sovereignty of each respective government. *See* David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations Self-Government,* 1 REV. CONST. STUD. 120, 121 (1993); American Indian Law Center, Handbook State-Tribal Relations (1981), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html. Following the guidance provided by this Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi,* tribal and state governments have worked together cooperatively, have avoided costly litigation, and have entered into numerous compacts and agreements that clearly demarcate their respective authority over a variety of subject areas, including tax administration, land use and zoning, natural resource management and law enforcement.

Intergovernmental cooperative agreements have distinct advantages, including the ability to offer flexibility in accommodating local needs; the opportunity to address the ambiguity inherent in overlapping jurisdictional authority; and the capacity to provide comprehensive resolution to complex questions of law. In fact, several states have recognized these distinct advantages and have adopted legislation authorizing state agencies to enter into cooperative agreements with Indian tribes. *See Nevada v. Hicks,* 533 U.S. 353, 393 (2001) (O'Connor, J. concurring) citing Mont.Code Ann. § 18-11-101 *et seq.* (1997) (State-Tribal Cooperative Agreements Act);[5] Neb. Rev. Stat. § 13-1502 *et seq.* (1997)

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[5] In *The Tribal Nations of Montana: a Handbook for Legislators* (1995), the State of Montana recognized its long history of cooperation with Indian tribes:

> In 1981, in recognition of the government-to-government relationship and to promote cooperation, the Legislature enacted

(Continued on following page)

(State-Tribal Cooperative Agreements Act);[6] Okla. Stat., tit. 74 § 1221 (Supp. 2001) (authorizing Governor to enter into cooperative agreements on behalf of the State to address issues of mutual interest).[7] *Also see* Ariz. Rev. Stat. § 11-952 (authorizes Arizona state agencies to enter cooperative agreements with Tribes) and Ariz. Rev. Stat. § 28-401 (specifically authorizes Arizona Department of Transportation to enter into fuel tax compacts with Tribes).

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chapter 11, part 1, MCA) that authorizes public agencies, including cities, counties, school districts, and other agencies or departments of the state, to enter into cooperative agreements with Montana's tribal governments. To date, over 500 agreements, relating to a variety of governmental services, have been negotiated and completed."

Id. at 14, *available at* http://www.leg.state.mt.us/content/committees/interim/2001_2002/st_trib_rel/handbook.pdf. In the motor fuel tax context, Montana and the Tribes agree that the purposes of the agreement "are to avoid legal controversy and possible litigation over the taxation of gasoline [on the Reservation], to avoid dual taxation of gasoline by both the Tribes and the State, and to ensure that the same level of taxation is imposed on the distribution of gasoline both within and outside the boundaries of the Reservation." *See* Fort Peck-Montana Gasoline Tax Agreement at 1, *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html.

[6] In Nebraska, the State has entered into motor fuel tax compacts, indicating its view that "cooperation and negotiation between the [State] and the [Tribes] is more productive and beneficial to the State and the citizens of the State. . . . " *See* Agreement For the Collection and Dissemination of Motor Fuels Taxes Between the State of Nebraska and the Winnebago Tribe of Nebraska at 1, *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html.

[7] *See infra*, Part I.D. In addition, many other states are working with tribes to adopt intergovernmental transportation agreements for tribal-state collaboration in their roads programs. For further information, *see* Federal Highway Administration, State Programs, *available at* http://www.fhwa.dot.gov/hep/tribaltrans/state.htm (providing details on tribal-state activities in Wisconsin, Minnesota, California, Washington, New Mexico, Iowa and Montana).

A. The State of Kansas Refuses To Work Cooperatively with the Kansas Tribes on Issues of Overlapping Jurisdictional Authority.

The State of Kansas wrongly suggests to the Court that the balancing of the interests test has proven "unworkable" and that it must be replaced with a bright-line test under which petitioner gets everything and Indian tribes get nothing. The only aspect of the balancing test that has proven "unworkable" is petitioner's reliance on litigation to resolve disputes arising from overlapping jurisdictional authority which, in turn, stems from its unwillingness to negotiate cooperative tax agreements with Indian tribes.

As recognized by Chief Justice Rehnquist, on behalf of a unanimous Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi*, state governments have alternative mechanisms available to them in lieu of litigation, including the ability to "enter into agreements with tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." 498 U.S. at 518. Further, the Court held that, although a state could require Indian retailers to collect state imposed taxes on certain sales to non-members, tribal sovereign immunity precluded States from suing Tribes to collect the taxes. *Id.*

At least partly in reliance on this Court's suggestion in *Citizen Band Potawatomi*, hundreds of state-tribal agreements, covering a broad range of topics, have been negotiated in good faith during the past 15 years – evidence of a strong commitment on the part of Indian tribes, as well as a number of States, to address issues of mutual concern through cooperation, not confrontation. *See Nevada v. Hicks*, 533 U.S. at 393 (O'Connor, J. concurring) ("there are a host of cooperative agreements between

tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement"); David H. Getches, *et al.*, Federal Indian Law at 619-20 (4th ed. 1998); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage,* 112 HARV. L. REV. 922, 930 (1999) ("Negotiated compacts reduce intergovernmental tensions and encourage cooperation that transcends historical prejudices. . . . a welcome change from the historically bitter condition of relations between tribes and states.").

Unfortunately, petitioner is no longer committed to working cooperatively with Indian tribes located within the State of Kansas, and instead resorts to a zero sum game strategy. At one point in time, Kansas did enter into state-tribal tax agreements, clearly recognizing that tribal governments provide significant programs and services to their communities – communities consisting of both Indians and non-Indians. *See, supra* at 3. Petitioner's current self-serving position in this case ignores the relevance and practicality of intergovernmental cooperative agreements. Unlike litigation, these voluntary arrangements are the preferred mechanism – and at times the only mechanism – to accommodate the competing interests of two sovereigns.

B. The Experience of the Navajo Nation is Instructive of the Tremendous Advantages of State-Tribal Cooperative Agreements.

In the motor fuels tax context, a unique example of coordination and cooperation is the agreements between the Navajo Nation and five States – Arizona, New Mexico, Utah, California and Texas. The Navajo Nation is the largest Indian tribe in the nation, both in population and land area. The Navajo Nation's territory spans 25,000

square miles in the southwestern United States, with reservation lands located in portions of Arizona, New Mexico and Utah. The 2000 Census shows the population of the Navajo Nation as 180,462 with more than 96 percent Native American. Navajo Nation Division of Economic Development, *Navajo Nation Data from U.S. Census 2000* 1 (2001).

Like all tribal governments, the Navajo Nation funds a broad range of programs and activities, including, economic development, community development, human resources, natural resources, public safety, health services, social services, education, road construction and maintenance, legislative and judicial services. The primary revenue sources of general funding for these essential governmental services are royalties from mineral resource development and taxes. The Office of the Navajo Tax Commission administers seven taxes, including the Possessory Interest Tax, the Business Activity Tax, the Oil and Gas Severance Tax, the Hotel Occupancy Tax, the Tobacco Products Tax, the Sales Tax and the Fuel Excise Tax. Navajo Nation Code tit. 24 §§ 101-923.

The Navajo Nation Fuel Excise Tax went into effect on October 1, 1999. The fuel tax revenues are deposited into the Navajo Nation Road Fund. The Navajo Nation Road Fund is dedicated to road development, maintenance and construction. Navajo Nation Code tit. 12 § 1002. The Navajo Nation imposes a tax of 18 cents per gallon on gasoline and diesel fuel. Navajo Nation Code tit. 24 §§ 903-05. The tax is imposed on the privilege of distributing or retailing any amount of fuel within the Navajo Nation. Navajo Nation Code tit. 24 § 903. There are 29 registered distributors and 69 registered retail fuel locations operating or located on the Navajo Nation. The Navajo Nation

currently collects approximately $12,000,000 annually in fuel excise taxes.

In an attempt to efficiently and effectively administer the Navajo Fuel Excise Tax, the Navajo Nation has voluntarily and respectfully engaged in extensive interaction with neighboring states. This cooperation has focused on the coordination of tax administration activities and the sharing of information on a regular basis.[8] In all, the Navajo Nation has entered into agreements with five states – Arizona, New Mexico, Utah, Texas and California.[9]

The Navajo Nation and the several States understand that there is a shared interest in the prevention of unlawful use or sale of untaxed fuel. These intergovernmental

[8] One recent example of these cooperative efforts is the work of the Governor's Gasoline Tax Working Group in the State of New Mexico. In an effort to provide a forum for in-depth analysis of the gasoline tax issue and to allow various stakeholders to express their concerns, Governor Richardson appointed individuals with working knowledge of the tax issues from state government, tribal governments and the gasoline industry. In 2003, this group met, discussed, studied and analyzed the issues. In August, 2003 this group made recommendations on improving the fuel tax reporting system in the State of New Mexico. *See* Report and Recommendations By the Governor's Gasoline Tax Working Group (August 12, 2003).

[9] *See* Intergovernmental Agreement between Arizona Department of Transportation and Navajo Tax Commission (May 7, 1999); Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the California State Board of Equalization (November 13, 2001); Amended Agreement on Exchange of Tax Information Between the Office of the Navajo Tax Commission and the New Mexico Taxation and Revenue Department (March 9, 2004); Agreement on Exchange of Information Between the Office of the Navajo Tax Commission and the Texas Comptroller of Public Accounts (February 7, 2001); and the Intergovernmental Agreement between the State Tax Commission of Utah and Office of the Navajo Tax Commission (October 16, 2000), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html.

fuel-tax agreements were entered into to foster the coordination of tax compliance efforts amongst the various taxing jurisdictions. Based on the agreements, the States and the Navajo Nation can effectively and efficiently administer the collection of the applicable fuel excise taxes and may share tax information. These agreements also allow for joint audits of fuel distributors and retailers. Under the agreement with the State of Utah, the Governor of Utah and the President of the Navajo Nation have agreed to communicate annually regarding plans for addressing the infrastructure deficit on the Utah portion of the Navajo Nation.

By entering into these cooperative agreements, the Navajo Nation realized an opportunity to more fully develop its own tax program. The Navajo Nation has long recognized that a serious infrastructure deficit exists within the Navajo Nation compared to similar non-Indian rural areas. The lack of adequate roads is one factor which impedes economic development within the Navajo Nation. The Navajo Nation Department of Transportation has determined the cost of the current and future road needs for the next twenty years to be nearly $4.5 billion. This need is quadruple the funding levels provided under the Indian Reservation Roads program as authorized by the Federal Lands Highway Program. *See* Transportation Equity Act for the 21st Century, Pub.L. No. 105-178, 112 Stat. 107 (June 6, 1998); Navajo Nation Department of Transportation, *Navajo Nation Long Range Comprehensive Transportation Plan*, chap. VI-3 (2003). Thus, the Navajo Nation faces a deficit of more than $3 billion to meet the current and future needs of the Navajo road system.

In an effort to provide more funds to defray the cost of the development, construction and maintenance of

transportation projects on the Navajo Nation, the Navajo Nation Road Fund was established. This fund is entirely dependent on the revenues generated from Navajo fuel excise taxes. The States of New Mexico and Utah statutorily allow a deduction for gallons or a credit for fuel excise taxes paid to the Navajo Nation. N.M. Stat. Ann. § 7-13-4(E), 4.4 (1999); Utah Code Ann. § 59-13-201(9) (2004). The intergovernmental agreement with the State of Arizona provides for a tax sharing arrangement which allocates a percentage of the fuel excise tax revenues between the State and the Navajo Nation.

These statutory provisions and agreements allow for the fuel distributed and sold on the Navajo Nation to bear a similar tax burden as the fuel sold outside the Navajo Nation. The agreements avoid a dual taxation problem that would most certainly make the cost of fuel on the Navajo Nation extremely more expensive because of the layering of the state taxes on top of the Navajo Nation fuel tax. This accord allows the Navajo Nation to defray a portion of the cost of road development, construction and maintenance on the Navajo Nation. Navajo Nation Code tit. 12 § 1002. Any change in the law to allow states to impose taxes on fuel sales on the Navajo Nation would have a very serious detrimental impact, crippling the Navajo Nation's ability to construct and maintain roads throughout on its lands.

C. In a New Era of Cooperation, South Dakota and the Sioux Tribes Have Entered Into Tax Agreements That Create Efficiency and Ensure Predictability.

The nine Sioux Tribes in South Dakota are among the poorest in the U.S. and have a long and difficult history, maintaining constant vigilance to protect their inherent

sovereign authority from incursions by the State of South Dakota. In South Dakota, one of the earliest intergovernmental tax compacts arose on January 1, 1971 between the State and the Oglala Sioux Nation. Under the terms of this tax compact, the Tribe authorized the State Department of Revenue to administer the collection of certain taxes within the Pine Ridge Indian Reservation and the State sent 83% of the tax collected back to the Tribe.

In 1974, based on the ease and convenience created by this early tax compact, the State Legislature passed SDCL 10-12A, codifying the authority of the State Department of Revenue to enter into tax compacts with all Indian tribes in South Dakota. Without explanation, in the late 1980's, the State refused to negotiate any more agreements with the Sioux Tribes. The late Governor Mickelson and his administration obstinately opposed any attempt to engage in fair dealings by litigating each and every tax issue they could. Similar to the present actions by the State of Kansas, South Dakota would single out a Tribe and seek to strip away their power to tax. This invasion of Tribal tax authority initiated by the State soured Tribal-State relations in South Dakota, and no new tax agreements were made during the period. This strategy of protracted and expensive litigation often left the Sioux Tribes in an inferior negotiating position,[10] until the federal courts

[10] The uneven negotiating position that Tribes in South Dakota suffer from is exacerbated by the lack of resources and the poverty of the Sioux Reservations in South Dakota. *See* U.S. Dept. of Commerce, Bureau of the Census, *The 100 Poorest Counties in the United States*, CPH-L-184 (1990). According to the 2000 Census, Ziebach County and Dewey County, which are within the Cheyenne River Sioux Reservation, have poverty rates of 49.9% and 33.6% respectively. U.S. Census Bureau, 2000 Census of Housing and Population, *Summary Social, Economic, and Housing Characteristics*, PHC-2-43, South Dakota.

upheld their inherent sovereign authority. *See, e.g., South Dakota v. U.S. and Cheyenne River Sioux Tribe*, 105 F.3d 1552 (8th Cir. 1997), *cert. denied*, 522 U.S. 981 (1997), *on remand*, 102 F.Supp.2d 1166 (D.S.D. 2000) (striking down state motor vehicle tax as applied to tribal members residing on their reservations).

In spite of these difficulties, a new era of cooperation and negotiation has arrived in South Dakota. When Governor Rounds took office in January 2003, the State once again began to seriously discuss intergovernmental tax agreements with the Sioux Tribes.[11] On March 24, 2003, the State Legislature passed several amendments to SDCL 10-12A of the South Dakota Code.[12] There were two substantive changes made. First, the State Legislature repealed all language relinquishing the State's claims of jurisdiction over Indians within Indian reservations in relation to five categories of state tax.[13] Second, the State enumerated seven categories of state taxes that the State

[11] Unfortunately, the South Dakota Attorney General's Office continues a strategy of litigation before negotiation and agreement. *See South Dakota v. Mineta*, 278 F.Supp.2d 1025 (D.S.D. 2003) (Tribal Employment Rights Tax paid by private contractors); *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395, 403 (S.D. 2003) reh'g denied (Apr 01, 2003), reh'g granted in part (Apr 02, 2003), Opinion Vacated in Part on Rehearing, 674 N.W.2d 314, 2004 SD 3 (S.D. 2004), *cert. denied*, 541 U.S. 1064 (2004) (motor fuel tax).

[12] Not coincidentally, on February, 26, 2003, the South Dakota Supreme Court had ruled that the Hayden-Cartwright Act does not provide congressional authorization for States to levy fuel taxes within Indian reservations. *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d at 403.

[13] The five categories of state tax are: a retail sales and service tax; a use tax; a cigarette tax; a contractors' excise tax; and an alternate contractors' excise tax.

could include in a tax agreement with a Tribe, including motor fuel taxes.[14]

Significantly, since 2003 the State has entered into Tax Collection Agreements with the four largest tribes in South Dakota: the Cheyenne River Sioux Tribe, the Oglala Sioux Nation, the Rosebud Sioux Tribe, and the Standing Rock Sioux Tribe.[15] Generally, these Tax Collection Agreements provide mechanisms to administer the collection of taxes to the benefit of both the State and the Tribe. Under these agreements, the Tribe agrees to impose a tribal tax that is uniform with the state tax, easing the ability of individual merchants and the State to collect the tax while addressing any unfair competitive advantage. *See, e.g.*, Tax Collection Agreement between the Cheyenne River

[14] The amendment allowed the State to add two additional tax categories: a motor vehicle excise tax and a fuel excise tax. In February 2005, three more tax categories were added, bringing the total to ten taxes that can be mutually agreed upon.

[15] The provisions of each Tax Collection Agreement are similar in substance. *See* Tax Collection Agreement between the Cheyenne River Sioux Tribe and the South Dakota Department of Revenue and Regulation and the State of South Dakota (September 29, 2003), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html. This agreement provided a cooperative mechanism for collection of certain taxes within the exterior boundaries of the Cheyenne River Sioux Reservation which contains 2.8 million acres (roughly the size and shape of the State of Connecticut). The agreement covers many areas of taxation, including a retail sales and service tax, a use tax, a contractors' excise tax, an alternate contractors' excise tax, a cigarette tax, and a fuel excise tax. There are several terms in this agreement which ensure that these taxes can be collected fairly without causing any disadvantages to either the State or the Tribe. The tax agreement expedites information sharing between the State and the Tribe while also protecting the confidential information of individuals, such as tax return, tax liability, or personal income information.

Sioux Tribe and the South Dakota Department of Revenue and Regulation and the State of South Dakota, at 4-6.

The Tax Collection Agreements are extremely beneficial to the State, creating an efficient and economical tax collection system on the Reservations. The agreements do impose a hardship on many tribal members who live in poverty and have great difficulty in paying the higher tax rates mandated in the agreements. However, the tax agreements are beneficial to the tribal governments by helping raise much needed revenue to assist in financing numerous initiatives, including the construction, maintenance and improvement of tribal roads throughout the Reservations.

If the Supreme Court rules in favor of Kansas and sets aside the balancing of interests test in favor of a bright-line rule, South Dakota will have no incentive to enter into future, or to honor current, Tax Collection Agreements. Under such a ruling, South Dakota could not only circumvent the existing agreements with respect to the motor fuel taxes (*vis-à-vis* imposing the tax on the distributor), but by legislative fiat could circumvent the agreements in relation to the other state taxes by imposing the "legal incidence" of a tax upstream, off-Reservation (*e.g.*, wholesalers of food, clothing, etc.).

D. This Court's Decision in *Oklahoma Tax Commission v. Chickasaw Nation* Provided a Prime Opportunity for the State of Oklahoma and its Indian Tribes To Work Together To Resolve Their Tax Disputes.

The existing relationship between the State of Oklahoma and the thirty-seven federally-recognized Indian tribes located within its borders is based on the unique

history of the State and the development of federal laws applicable to Indian affairs within the State. *See* Brad A. Bays, *Tribal State Tobacco Compacts and Motor Fuel Contracts in Oklahoma* in THE TRIBES AND THE STATES: GEOGRAPHIES OF INTERGOVERNMENTAL INTERACTION, 181, 182-86 (Brad A. Bays and Erin Hogan Fouberg, Rowman & Littlefield Publishers, Inc. 2002). The number of tribal governments located in Oklahoma, along with significant federal legislation directed specifically to Indian affairs in Oklahoma, has made coordination and cooperation between the sovereign governments a formidable task.

The legal relationship between Oklahoma and the tribes located in Oklahoma has been complicated at times and has led to litigation concerning the scope of authority between the sovereign governments. Indeed, several of the precedent-setting taxation cases decided by this Court in the last fifteen years are a result of challenges asserted by Oklahoma Tribes against various forms of state taxation within a tribe's Indian country.[16] *See Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (motor fuels tax); *Oklahoma Tax Commission v. Sac & Fox*, 508 U.S. 114 (1993) (motor vehicle excise tax and registration fees); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (tobacco tax). Despite these conflicts, the State and the Oklahoma Tribes have been able to resolve certain differences through government-to-government negotiations

[16] Although the Osage Tribe is the only tribe in Oklahoma with its historical reservation boundaries intact (making up the entire Osage County, Oklahoma), the Indian country lands for the other tribal governments are in the form of tribal trust land and allotments and are scattered throughout numerous counties within the jurisdictional boundaries for each respective tribe.

and agreements that are continuing to benefit both parties while respecting each other's sovereign rights.

State and tribal leaders have not always agreed, especially on those issues that significantly offend the sovereign status of the governmental entity in conducting its affairs. One such contentious issue involved the sale of motor fuels by the Oklahoma Tribes in their Indian country. First, the State had an administrative concern in relation to their ability to efficiently collect the state tax from the sale of motor fuel by tribal retailers. Second, the State had a political concern that without a uniform tax rate, the Tribes (with their lands scattered in both rural and high traffic areas) would have an unfair competitive advantage over non-Indian retailers and convenience store operators.

In the late 1980s, the State attempted to impose the state motor fuel tax on retail sales by the Chickasaw Nation which owned and operated two convenience stores located on tribal trust land.[17] The Tribe objected on the basis that under Oklahoma law the motor fuel tax was imposed on the retailer and, as such, were illegal direct taxes on the Tribe. When no resolution was reached, the Tribe filed suit against the state in federal court which was eventually resolved by this Court in *Oklahoma Tax Commission v. Chickasaw Nation.* In *Chickasaw,* the Court held that Oklahoma could not impose its motor fuel tax on the Tribe based on the fact that the legal incidence of the motor fuel tax was placed on the Tribe as a retailer. As tribes continued to expand and establish more retail

[17] The jurisdictional authority of the Chickasaw Nation includes more than 7,648 square miles in south-central Oklahoma and encompasses all or part of thirteen counties.

fuel stations, the *Chickasaw* decision presented a prime opportunity for the State and the Oklahoma Tribes to work together, sovereign-to-sovereign, in an effort to find a comprehensive solution to many of the issues left unresolved by the courts.

In 1996, following substantial deliberation, the Oklahoma Legislature modified its Motor Fuel Tax Code to provide authority for the State to enter into Motor Fuels Contracts with the Oklahoma Tribes as a compromise on the collection of taxes on tribal sales of motor fuels to non-Indians. Okla. Stat. tit. 68 § 500.1 *et seq.*[18] This legislation was a compromise for both sides, but it created a frame-work under which an efficient tax collection system was established in Indian country with the Oklahoma

[18] The legislative findings of the Motor Fuel Tax Code amendments provide that:

> It is mutually beneficial to the State of Oklahoma and the federally recognized Indian tribes of this state, exercising their sovereign powers, to enter into contracts as set forth in subsection B of this section, for the purpose of limiting litigation on the issue of state government taxation of motor fuel sales made by Indian tribes. It is in the interest of this state to resolve disputes between the state and federally recognized Indian tribes on this issue by entering into contracts under which the Indian tribes are in part compensated for any tribal motor fuel tax revenues the Indian tribes might lose by reason of the adoption and enforcement of this act. Such mutually beneficial agreements allow both the State of Oklahoma and the Indian tribes to benefit from tax revenues from sales of motor fuel on Indian country. Okla. Stat. tit. 68 § 500.63(A)(4).

In the words of the Oklahoma state courts, the purpose of the legislation is not to create an indebted relationship between the Tribes and the State, but to create a "joint action between two sovereigns." *See Ryals v. Keating*, 2 P.3d 378 (Okla. Ct. App. 1999) (upholding motor fuel contract legislation as valid under the Oklahoma Constitution).

Tribes receiving a substantial portion of the motor fuel taxes. In addition, the legislation addressed the State's concern that tribal retailers could undercut off-Reservation retailers.[19] Both the State and the Oklahoma Tribes who entered into Motor Fuels Contracts would benefit by avoiding costly litigation in relation to further efforts to enforce the collection of state motor fuel taxes. The Tribes would be able to focus their resources in their efforts to expand their business enterprises in a predictable legal climate.

The ability of a state government and a tribal government to reach a compromise is no easy task. In Oklahoma, intergovernmental cooperative agreements between the State and the Tribes, including the Motor Fuels Contracts, were a result of many years of negotiation based on key decisions by state and federal courts. As of February 2004, thirty-three of the thirty-seven federally-recognized tribes in Oklahoma have entered into motor fuels tax compacts with the State.[20] The benefits of the

[19] "Across the United States, the primary issue of contention between tribal and state governments is not so much the fact that many tribes successfully evade state fuel excise taxes. The real issue is that tribes have at times used their sovereign status – particularly the fact that they are immune from civil actions – to undercut off-reservation retailers." Bays, *Tribal State Tobacco Compacts and Motor Fuel Contracts in Oklahoma* at 192.

[20] The State of Oklahoma has entered into motor fuel tax contracts with thirty-three Indian tribes: Chickasaw Nation/State of Oklahoma (09/26/96); Cherokee Nation/State of Oklahoma (09/26/96); Choctaw Nation/State of Oklahoma (09/30/96); Ottawa Tribe/State of Oklahoma (06/25/97); Peoria Tribe/State of Oklahoma (10/08/97); Muscogee (Creek) Nation/State of Oklahoma (10/08/97); Seminole Nation/State of Oklahoma (10/08/97); Miami Nation/State of Oklahoma (10/08/97); Modoc Tribe/State of Oklahoma (10/08/97); Ponca Nation/State of Oklahoma (03/30/98); Kialegee Tribal Town/State of Oklahoma (06/01/98); Eastern Shawnee Tribe/State of Oklahoma (06/01/98); Cheyenne-Arapaho

(Continued on following page)

cooperative working relationship attained through these contracts go beyond the motor fuels tax context, as the relationship evolves to face other areas of overlapping jurisdictional authority. A decision by this Court in favor of the State of Kansas, which chooses a course of litigation, will seriously undermine the hard-won success reached in Oklahoma through cooperation and compromise.

E. After Years of Negotiation, the State of Michigan and its Tribes Have Developed A Uniform Tax Agreement Which Provides Both Predictability and Flexibility.

On December 20, 2002, the State of Michigan and eight of the twelve federally recognized Indian tribes of Michigan successfully concluded negotiations and signed uniform tax agreements (collectively referred to as the

Tribes/State of Oklahoma (09/03/98); Wichita & Affiliated Tribes/State of Oklahoma (09/30/98); Thlopthlocco Tribal Town/State of Oklahoma (12/17/98); Delaware Tribe of Indians/State of Oklahoma (12/29/98); Pawnee Tribe of Oklahoma/State of Oklahoma (03/10/99); Sac & Fox Nation/State of Oklahoma (04/21/99); United Keetoowah Band of Cherokees/State of Oklahoma (09/30/99); Comanche Nation/State of Oklahoma (03/31/00); Tonkawa Tribe/State of Oklahoma (03/31/00); Otoe-Missouria Tribe/State of Oklahoma (04/03/00); Apache Tribe/State of Oklahoma (05/08/00); Alabama Quassarte Tribal Town/State of Oklahoma (06/14/00); Absentee Shawnee Tribe/State of Oklahoma (08/15/00); Caddo Tribe/State of Oklahoma (09/13/00); Kaw Nation/State of Oklahoma (01/02/01); Quapaw Tribe of Oklahoma/State of Oklahoma (01/02/01); Kickapoo Tribe of Oklahoma/State of Oklahoma (03/30/01); Delaware Nation/State of Oklahoma (10/02/01); Shawnee Tribe/State of Oklahoma (09/09/02); Kiowa Tribe/State of Oklahoma (12/03/03); Seneca-Cayuga/State of Oklahoma (02/10/04), *available at* http://www.narf.org/sct/caseindexes/current/richards-cooperative-agreements.html. Information regarding the Oklahoma-Tribal Motor Fuel Tax Agreements, *available at* http://www.state.ok.us/~oiac/StateTribal.htm.

"Uniform Tax Agreement").[21] The Uniform Tax Agreement was the result of nearly three years of intense negotiations among the Michigan Tribes themselves, and between the State and the Tribes.[22] The Uniform Tax Agreement is comprehensive and covers six categories of state taxes: (1) sales tax;[23] (2) use tax;[24] (3) individual income tax;[25] (4) motor fuel tax;[26] (5) cigarette tax;[27] and (6) single business tax.[28]

Intergovernmental tax agreements between the State and the Michigan Tribes are not a recent development.

[21] All twelve federally recognized Indian tribes in Michigan negotiated with the State. Thus far, eight Michigan Tribes have signed the Uniform Tax Agreement. *See* Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Little River Band of Ottawa Indians and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Pokagon Band of Potawatomi Indians of Michigan and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Bay Mills Indian Community and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan (Dec. 20, 2002); Tax Agreement Between the Hannahville Indian Community and the State of Michigan (Dec. 20, 2002), *available at* http://www.michigan.gov/cis/0,1607,7-121-1748_23287---,00.html.

[22] For a fuller discussion of the negotiations in Michigan, *see* Thomas J. Kenny, Paul W. Shagen and Marjorie B. Gell, *Negotiation of Tax Compacts for Developing Standards of State Taxation in Indian Country*, STATE TAX NOTES 471 (Feb. 14, 2005); Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004).

[23] MCL § 205.52(1), *et seq*.

[24] MCL § 205.92(1), *et seq*.

[25] MCL § 206.51(1), *et seq*.

[26] MCL § 207.1104(j).

[27] MCL § 205.421, *et seq*.

[28] MCL § 208.31, *et seq*.

Since the 1970s, the State has entered into tax agreements on a tribe-by-tribe basis, covering a variety of state taxes, including the individual income tax, motor fuel tax and cigarettes tax. Although this approach resulted in tax agreements with certain Michigan Tribes, it failed to adequately address state taxation within Indian country, resulted in inconsistent tax treatment and imposed administrative burdens on the State. Beginning in 1995, the State indicated that it would no longer enter into tax agreements with different provisions.

Instead, the State sought to develop a single uniform tax agreement. With this in mind, the State and the Bay Mills Indian Community ("Bay Mills") entered into a tax agreement on January 1, 1997. The Bay Mills tax agreement addressed application of the Michigan sales tax, use tax, cigarette tax, gasoline tax, diesel fuel tax, individual income tax and single business tax to Bay Mills and its members. On the heels of what was deemed to be a successful round of negotiations with Bay Mills, the state subsequently revoked the existing tax agreements with other Michigan Tribes, insisting that they sign tax agreements identical to the one executed with Bay Mills. However, the State had underestimated the uniqueness and autonomy of each Michigan Tribe. Since the other tribes did not participate in the negotiations, they refused to enter into any such uniform tax agreement. As a result, the State chose to terminate the Bay Mills tax agreement, at which point there was uncertainty as to whether new tax negotiations would commence.

However, it was clear that the State still recognized the value of negotiating tax agreements on a more comprehensive scale. In March 1997, Michigan's Department of Treasury issued a report recommending that the State

begin negotiating a uniform and comprehensive tax agreement with the Michigan Tribes. The report, which in part was an attempt to provide certainty to the taxability of activities in Indian country, concluded:

> Negotiating "tax treaties" which would define the privileges, exemptions and obligations of both tribes and state governments may represent a rewarding means of resolving these issues . . . [T]he State of Michigan has successfully used state-tribal agreements in the past. Many states, such as New York and Michigan, are continuing to expand such agreements.[29]

The tribal chairpersons from the Michigan Tribes (the "Michigan Council") met March 16, 2000 to discuss issues of mutual concern, including the State's desire to enter into a uniform tax agreement. The Michigan Council pledged that not a single Indian tribe would "enter into any uniform tribal-state tax agreement proposed by the State of Michigan, [but rather collectively the tribes would] formulate a position on state taxation which embodies their common interests, and yet recognizes the need to accommodate their individual sovereign interests."[30] After nearly a year of inter-tribal negotiations, the Michigan Tribes finalized a compromise proposal to submit to the State.

On June 27, 2001, the Michigan Tribes and the State commenced negotiations with monthly meetings, which usually lasted two to three days and involved significant

[29] Office of Revenue and Tax Analysis, Michigan Department of Treasury, *Taxation of American Indians in Michigan* (March 1997). The State of Michigan in its report stated that it sought to bring certainty to an area in which "[t]he unique status of American Indians has created confusion regarding the taxable status of many activities."

[30] Resolution No. 00-2, Michigan Council (2000).

travel and expense, clearly demonstrating their commitment to finalizing and formalizing a Uniform Tax Agreement. During negotiations, the parties developed unique solutions to difficult issues,[31] while relying upon well-established federal Indian law. Consistent with the principles established by this Court, the parties utilized the doctrine of federal preemption, and the attendant balancing analysis, to assess their respective rights.

This was particularly true with respect to nonmember exemptions from sales tax for transactions within Indian country.[32] For example, the legal incidence of the Michigan sales tax is upon the retailer.[33] The Michigan Tribes asserted that the sales tax does not apply to Indian country sales by nonmember retailers to the Michigan Tribes or their members as it is preempted under the balancing preemption analysis. While the state disagreed with the Michigan Tribes, the parties ultimately agreed to extend a sales tax exemption to both tribal and tribal member purchases with certain restrictions.[34]

Unlike past tax negotiations, which generally involved the State and a single tribe, the State and all of the Michigan Tribes cooperated to finalize the Uniform Tax Agreement, which has resulted in improved, cooperative

[31] The tax agreement proposed by the Michigan Tribes, and submitted to the State, reflected their interpretation of the tax immunities secured under federal Indian law. While their proposal formed the starting point for the negotiations, the parties almost immediately moved away from it. The ensuing negotiations focused on developing an agreement that both reflected and departed from established principles of federal Indian law.

[32] Tax Agreement, Section III. A.

[33] *See* MCL § 205.52(1).

[34] Tax Agreement, Section III. A. 1. b. and III. A. 2., 3., 4., 5., and 7.

relationships. It represents arms-length negotiations in which the parties worked to resolve their differences through creative solutions while being mindful of the legal parameters established by the Court. Any significant change in the fundamental legal principles upon which the tax agreement is based would undermine the entire process.[35]

The current Uniform Tax Agreement is working well. It brought predictability to a disputed area. While there have been disagreements regarding interpretation of the Uniform Tax Agreement, the parties anticipated this and agreed to attend an annual summit to discuss their differences and agreed to a dispute resolution process that

[35] For example, the purpose and intent of the Tax Agreement reflect the parties' effort to bring predictability to an uncertain disputed area, stating:

> By entering into this Agreement the State and the Tribe indicate their intention and willingness to be bound by its terms so long as this Agreement is in effect. While this Agreement is in effect between the Tribe and the State it is agreed that: (i) their respective rights will be determined by this Agreement with respect to the taxes that are the subject of this Agreement, (ii) neither party will seek additional entitlement or seek to deny entitlement on any federal ground (including federal preemption) whether statutorily provided for or otherwise with respect to the taxes that are the subject of this Agreement, (iii) neither party will contest the legality of the Agreement or the legal authority of any of its provisions, and (iv) both parties will defend this Agreement from attack by third parties.

While this statement indicates that neither party will seek or deny entitlement based upon any federal ground during the period the Tax Agreement is in effect, a significant change in federal law may motivate the state to terminate the agreement and seek payment of additional taxes. The State of Michigan has joined the *amicus* brief prepared and filed by the State of South Dakota in support of the State of Kansas in this case.

includes binding arbitration.[36] Moreover, the success of the Uniform Tax Agreement is reflected in the fact that, to date, neither the State nor any Michigan Tribe has exercised its right to terminate the arrangement.[37]

However, a significant change in federal law would upset the Uniform Tax Agreement and would result in protracted disputes in the area of taxation and in other areas. In the absence of the balancing preemption analysis, the state undoubtedly would seize the opportunity to attempt to apply other laws to the Michigan Tribes, their members and nonmembers within Indian country. Such action would be contrary to the longstanding, workable framework, which involves balancing the respective interests of the parties.

CONCLUSION

Many States and Tribes have achieved great success in improving intergovernmental relations by finding practical, on-the-ground solutions. Through cooperation and the use of intergovernmental agreements, states and tribes have been able to accommodate local needs while addressing the ambiguities inherent in overlapping jurisdictional authority. The result sought by Petitioner will undermine the numerous state-tribal tax compacts, which in turn, will lead to more, not less litigation. The decision of the court of appeals should be affirmed.

[36] *Id.* at Section I. F. 1.

[37] Although the Uniform Tax Agreement has an indefinite term, either party may terminate the agreement with at least 90 days' written notice after two years from the effective date. Since two years have passed, either party may now exercise this right, but instead have elected to continue to be bound by the negotiated arrangement.

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